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Response to Request for Comment on Proposal to Extend Effective Date of ERISA §408(b)(2) Regulation and Transitional Rule of ERISA §404(a) Regulation

June 15, 2011

**Employee Benefits Security Administration
Department of Labor**

The American Society of Pension Professionals and Actuaries (“ASPPA”) and the Council of Independent 401(k) Recordkeepers (“CIKR”) appreciate the opportunity to respond to the request by the Department of Labor (“DOL” or “Department”) for comment with respect to the proposal to extend the effective date of Interim Final Regulation §2550.408b-2(c) (the “408(b)(2) regulation”) and the transitional rule in Regulation §2550.404a-5(j)(3)(i) the “404(a) regulation”.¹ This is an issue that is of great concern to the members of both ASPPA and CIKR.

ASPPA is a national organization of more than 7,500 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines including consultants, administrators, actuaries, accountants, and attorneys. ASPPA is particularly focused on the issues faced by small- to medium-sized employers. ASPPA membership is diverse and united by a common dedication to the employer-based retirement plan system.

CIKR is a national organization of 401(k) plan service providers. CIKR members are unique in that they are primarily in the business of providing retirement plan services as compared to financial services companies who primarily are in the business of selling investments. The independent members of CIKR offer plan sponsors and participants a wide variety of investment options from various financial services companies without an inherent conflict of interest. By focusing their businesses on efficient retirement plan operations and innovative plan sponsor and participant services, CIKR members are a significant and important segment of the retirement plan service provider marketplace. Collectively, the members of CIKR provide services to approximately 68,000 plans covering 2.8 million participants and holding in excess of \$120 billion in assets.

¹ Department of Labor, *Notice of Proposed Extension of Applicability Dates*, 76 Fed. Reg. 31544 (Jun. 1, 2011).

Summary

ASPPA and CIKR have strongly supported the Department's efforts to improve the disclosure of fees paid in individual account plans. We have provided extensive comments at every stage of this process. As we come to the "finish line," we believe that it is of critical importance that sufficient time be provided to make the necessary system changes to implement the final rules. Unfortunately, there is still a fair degree of uncertainty as to what will be required.

ASPPA and CIKR recommend that an extension of the applicability date for the 408(b)(2) regulation is absolutely necessary and should be provided. Similarly, we believe the extension of the transitional rule under the 404(a) regulation is insufficient relief given the delay in finalizing the 408(b)(2) regulation as well as the ongoing review of electronic disclosure standards under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and the applicability date of this regulation should also be extended. The applicability dates for these regulations should be no earlier than one year after the 408(b)(2) regulation is published in final form.

Discussion

Full disclosure by service providers of what they charge and how they are getting paid is critical information plan fiduciaries need in order to fulfill their responsibilities. Greater fee transparency allows plan sponsors to make better, more informed decisions, which ultimately is to the benefit of plan participants. Providing more detailed information to participants and beneficiaries will give them the tools they need to become better investors.

With that said however, it is important that sufficient time be provided to build the infrastructure that will be necessary to support the new disclosure regime. There is considerable systems work that still needs to be done. In most cases, system engineers are already in the process of rewriting software code and programs to accommodate the new disclosure requirements. Completing this work will nevertheless require additional time after the final regulation is issued as there remain open a number of issues that could greatly affect the ultimate design of any compliance system.

For example, a very important issue that remains to be resolved is whether the 408(b)(2) regulation, when finalized, will require a summary disclosure statement be provided to plan fiduciaries. The preamble to the 408(b)(2) regulation invited comment on the costs and burdens that would be associated with a summary mandate, the benefits to plan fiduciaries that would ensue and how to effectively construct such a requirement.² At this time, it is not clear how the Department will resolve this issue. If a summary of some type is required, the parameters for what it must contain and how it is to be formatted will significantly impact system design. Yet it is difficult, if not impossible, to begin such work without first having the specifications that must be satisfied.

² Department of Labor, *Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure*, 75 Fed. Reg. 41600, 41607 (Jul. 16, 2010).

Similarly, there remains uncertainty with respect to several issues under the 404(a) regulation. For example, a paragraph in the regulation was reserved to address the manner in which participant disclosures will be made.³ The preamble indicates that the Department would be exploring whether to expand or modify the current electronic disclosure standards found in DOL Regulation §2520.104b-1(c). In furtherance of this review, the Department recently published a Request for Information Regarding Electronic Disclosure by Employee Benefit Plans.⁴

In ASPPA's response to this request, we noted that there are differing standards for electronic disclosure under the Treasury regulations and the DOL regulations.⁵ In addition, DOL Field Assistance Bulletin 2006-03 provides a "good faith" standard for electronic disclosure of pension benefit statements furnished under ERISA §105(a) that has some additional modifications, particularly with regard to website access to information.⁶ This latter standard impacts disclosures under the 404(a) regulation which permits the quarterly expense information to be included on the pension benefit statement.⁷

At the present time, it is not clear which of these electronic disclosure standards will be available for compliance with the 404(a) regulation. According to the preamble, "It is anticipated that resolution of this issue will occur in advance of the compliance date for this regulation, so as to ensure for appropriate notice for plans."⁸ The comment period on the electronic disclosure request for information only concluded June 1, 2011 and the DOL website shows over 70 responses have been submitted.

Although we cannot speak to the Department's workload and schedule for release of guidance, it would appear likely that resolution of the electronic disclosure issue may not occur in the immediate future. Yet, the initial applicability date of the 404(a) regulation is just over 4 months away. It will be difficult if not impossible to design an electronic system within the time available. This puts providers in a very difficult place. It would be an extreme waste of resources if on the applicability date plan fiduciaries are put in the position of having different electronic communication standards for pension benefit statements as compared to participant communications under the 404(a) regulation. This waste will be magnified further if a new and improved method of electronic disclosure is permitted after the Department completes its review of the current regulation. To avoid this unnecessary burden, it would be far preferable to coordinate the timing of these initiatives as was indicated in the preamble to the 404(a) regulation.

An additional concern is the availability of a centralized database where plan administrators and service providers can easily and efficiently access the information they will need to fulfill

³ See, 29 CFR § 2550.404a-5(g).

⁴ Department of Labor, *Request for Information Regarding Electronic Disclosure by Employee Benefit Plans*, 76 Fed. Reg. 19285 (Apr. 7, 2011). ASPPA's response may be reviewed at <http://www.asppa.org/Document-Vault/pdfs/GAC/2011/06062011-comment.aspx>.

⁵ See, 29 CFR § 2520.104b-1(c); Treas. Reg. § 1.401(a)-21.

⁶ See, DOL Field Assistance Bulletin (FAB) 2006-03, Issue 2.

⁷ See, 29 CFR § 2550.404a-5(e)(2).

⁸ Department of Labor, *Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans*, 75 Fed. Reg. 64910, 64923 (Oct. 20, 2010).

their responsibilities. ASPPA has worked with the Investment Company Institute and a task force of our members to address the implementation issues associated with the regulation. Work is proceeding in furtherance of this effort. However, this effort is also handicapped by not knowing what the final standard will be. It is imperative that sufficient time be provided so that the new requirements can be met without unduly burdening plan sponsors and their service providers.

ASPPA and CIKR recommend that the applicability dates for both the 408(b)(2) regulation and the 404(a) regulation be extended. Without knowing what changes will be made in the final 408(b)(2) regulation, it is difficult to predict how much time will be needed. Our recommendation would be to make the applicability date no sooner than one year after the final regulation is published. Similarly, we believe the extension of the transitional rule under the 404(a) regulation is insufficient relief given the delay in finalizing the 408(b)(2) regulation as well as the ongoing review of electronic disclosure standards under ERISA. This regulation's applicability date should likewise be extended so that it may be coordinated with the Department's initiative on electronic disclosure to participants and beneficiaries. In no event should the applicability date for the 404(a) regulation precede the applicability date for the 408(b)(2) regulation.



These comments were primarily authored Craig P. Hoffman, APM, General Counsel and Director of Regulatory Affairs at ASPPA. We welcome the opportunity to discuss this further with you. Please contact Craig Hoffman, at (703) 516-9300 with respect to any questions regarding the matters discussed herein.

Thank you for your time and consideration.

Sincerely,

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